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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-865

JOSEPH STASSI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

JOSEPH STASSI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petitioner, Joseph Stassi, respectfully requests that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals, Second Circuit, entered on or about October 26, 1976,* affirming the judgment of the United States District Court, Southern District of New York, entered February 26, 1976, convicting the petitioner for a conspiracy under the first count of the indictment, based on 21 U.S.C. 173, 174 (repealed); 21 U.S.C. 812, 841, 846 and 963; under the second count of the indictment charging the illegal importation of heroin in violation of 21 U.S.C. 173, 174, 18 U.S.C. 2; under the third count of the indictment for receiving, concealing and selling heroin; under the fourth count of the indictment for importing in July 1971 heroin, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A), and under the fifth count of the indictment for the illegal distribution and possession with intent to distribute in June 1971 heroin, in violation of 21

*Pursuant to an order of Associate Justice Marshall, the petitioner's time to serve and file this petition was enlarged to December 23, 1976.

U.S.C. 812, 841(a)(1) and 841(b)(1)(A). As a consequence of the conviction, the petitioner was sentenced to thirty (30) years imprisonment, on counts 1, 2 and 3 to be served concurrently and fifteen (15) years imprisonment on counts 4 and 5, each fifteen (15) year term to run consecutively to the other but concurrently with the sentence under counts 1, 2 and 3; additionally, fines were imposed in the sum of $20,000 on counts 1, 2 and 3 and $50,000 on counts 4 and 5.

JURISDICTION

The order of affirmance of the United States Court of Appeals, Second Circuit, is dated October 26, 1976 and a copy of said order is reprinted herein as Appendix A, *infra*, the same being contained in the opinion of the said Circuit Court of Appeals for the Second Circuit.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

A. Was the petitioner deprived of his right to summon witnesses in his defense when the government deported a co-defendant named Jean Claude Otvos?

B. Did the Court in effect direct a verdict of guilty as to the substantive counts when it did not charge the jury that the petitioner could be acquitted of some or all of such counts, even though the jury could find the petitioner guilty under those counts if the jury found that the petitioner was a member of the conspiracy?

C. Did the Court below violate Rule 31, Federal Rules of Criminal Procedure, by requiring the jury to specifically respond to the Court's inquiry as to when the petitioner entered the conspiracy?

D. Were the trial court's comments that the government believed the petitioner guilty because this action was instituted, prejudicial to the petitioner's right to a fair trial?

E. Did the prosecution exceed the limits of fair comment in the prosecution's summation to the jury?

THE PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE RELIED UPON

Amendment V (in part):

". . . No person . . . , be deprived of life, liberty, or property, without due process of law; . . . "

Amendment VI (in part):

"In all criminal prosecutions, . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

21 U.S.C. 841 (a):

"Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally

(1) To manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance; . . . "

21 U.S.C. 846:

"ATTEMPT AND CONSPIRACY"

"Any person who . . . conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt of the conspiracy."

21 U.S.C. 963:

"ATTEMPT AND CONSPIRACY"

"Any person who . . . conspires to commit any offense described in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy."

Federal Rules of Criminal Procedure, Rule 31:

"Verdict — (a)***

"(b) ***

"(c) ***

"(d) ***

"(e) Criminal Forfeiture. — If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned to the extent of the interest or property subject to forfeiture if any . . . "

Federal Rules of Criminal Procedure, Rule 52:

"(6) Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

STATEMENT OF THE CASE

THE PRE-TRIAL HEARING TO DETERMINE WHETHER THE PETITIONER, JOSEPH STASSI, WAS DENIED HIS FUNDAMENTAL RIGHT TO COMPULSORY PROCESS OR TO CALL WITNESSES, NAMELY ONE JEAN CLAUDE OTVOS, IN THAT THE GOVERNMENT, WHILE THE INVESTIGATION IN THIS CASE WAS PENDING DEPORTED OTVOS

The Government's case against Joseph Stassi was based on the testimony of various accomplices who were inmates

of the Correctional Institution at Atlanta, Georgia, as was Joseph Stassi. Two of these witnesses, one Perna and Verzino, who testified for the Government in its case against Joseph Stassi, are not newcomers to this Court. As the further presentation of the facts herein will disclose, the Government claimed and offered to prove that a plot was formulated in the Correctional Institution at Atlanta to engage in the narcotic business. The source of the narcotics was to be from the brother of Otvos who was in France, and therefore Otvos, an inmate, was the "French connection". Ultimately Otvos was paroled and deported to France. The Government was instrumental in this. Otvos was an accessory and as is obvious, he was named in the indictment as a defendant.

THE EVIDENTIARY HEARING

The first witness called by the Government was J. Wayne Allgood who was employed by the United States Board of Parole as a hearing examiner for the Southeast region of the United States, which covered Atlanta, and specifically the supervision of the parole system in Atlanta Penitentiary (44).*

Otvos was sentenced in the United States District Court, Eastern District of New York, for a narcotic offense on May 11, 1967 and was committed to serve a term expiring January 28, 1981 (44). His net term, based on satisfactory institutional behavior, was fixed as June 23, 1976 which was also designated as the term of mandatory release (46, 47). Due to an intervening change in law, Otvos became eligible for parole in January 1974 (48). Accordingly, a request was made by the parole authorities to the Department of Justice for information as to whether Otvos was engaged in large scale crime of a "sophisticated nature" (49, Government's Exhibit 1D).

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* This refers to the pagination of the Appendix.

Gerald Shur, a Government attorney, was to deal with this request. The procedure was adopted because Otvos was a major narcotic offender (49, 50).

This witness' superior was Thomas Holsclaw, who died September 15, 1975. It was determined that Otvos, because of the change in the law effective September 28, 1971, was afforded a parole hearing and a summary of that was received in evidence as Government's Exhibit 1C (50-52). The summary referred to remanding the case to the entire Board of Parole in Washington (52). However alternatively, the authorities in Atlanta could have acted upon the case without the remand and ultimately they did (53). Before receiving an answer to the request referring to Otvos' involvement in major crime, the authorities granted parole solely for deportation on March 3, 1975 (53, 54, Government's Exhibit 1E).

The Immigration and Naturalization Service lodged a detainer against Otvos (55). Government's Exhibit 1D, a report from a Mr. Kinney, who was an Assistant Attorney General, was received by the authorities after a decision was made to deport Otvos (55, 56). On March 3, 1975 Otvos was deported (56). It was admitted that the regional parole authorities received the response to their inquiry but no action was taken on it (57, 58). Further copies of that response were sent to the institution at Atlanta, but not to the Department of Justice (59). Specifically a copy of that memorandum did not go to the Drug Enforcement Administration or the U.S. Attorney for the Southern District of New York, or anybody else (59). On cross examination this witness testified that the Board of Parole formulated the policy as to notice of parole (60, 61). It was admitted that the parole authorities as well as the Bureau of Prisons constituted a branch of the Department of Justice. However, the witness didn't know whether the Immigration and Naturalization Service was a branch of the Department of Justice (63). Allgood also admitted that if a warrant to hold Otvos were issued, the warrant would have been acted upon first (64). That the parole decision was received at the

Atlanta institution within three (3) days after it was made, namely January 30, 1975 and was on file with the local parole authorities where it could have been available for inspection by a U.S. agent (64). An agent for the Drug Enforcement Administration by merely making a telephone call could have ascertained that Otvos was to be paroled and deported (64). Allgood was questioned whether in 1975 there were practices with aliens who were paroled as was Otvos and Allgood stated that there may have been others that were paroled solely to be deported (65).

Of course Otvos' parole was limited only so that he could be deported and not otherwise (65). Copies of that parole decision were sent to the Court where the conviction of Otvos was had, (Government's Exhibit 1D). Further the report from Kinney, the Assistant Attorney General, was received one day after the decision was mailed to Otvos (66). Allgood did not know whether it was reviewed by the local parole authorities (66). Further that report never appeared in the file (67).

However the Parole Board did conduct what was termed rescission hearings which were conducted usually after parole was granted, but before the parolee's release (68, 69). Thus Otvos' parole could have been "retarded" so that a rescission hearing could have been conducted (69). Government's Exhibit 1D could have been a basis for the rescission hearing (69). Furthermore a report such as Government's Exhibit 1D usually was received before a decision was made by the parole authorities and if it was so, this witness would have seen it and its contents would have been an element of the decisional process involved in a parole hearing (70).

Allgood also related that a pre-release analyst upon receiving such a report as Government's Exhibit 1D, would have called Mr. Kinney to inquire about the contents (70). The pre-release analyst in this case, a Mr. Chait, however never remembered seeing that report (70, 71).

Allgood also confessed that there was no reason why a rescission hearing was not had in Otvos' case (71).

It further appeared that the files of the parole authorities were available to the United States Attorney, the FBI and the Drug Enforcement Administration. No request from the FBI was ever made as to Otvos (72). In January 1975 the petitioner Joseph Stassi came up for parole review (73). However the witness was uncertain as to whether the report as to Otvos was made prior to the report as to Joseph Stassi, the petitioner (73-75).

Allgood also testified that there was evidence that the petitioner was a suspect in conspiring with Otvos to import narcotics. However, Allgood could not remember the details and was not able to testify "exactly" as to what that report alleged (76). But to his "knowledge" the report did not so state (77). Counsel for Joseph Stassi then made a demand for that report but the U.S. Attorney stated that he did not have it (77, 78). Allgood also related that if an inmate was suspected of engaging in criminal activity during his incarceration, the parole authorities would investigate the matter as that would be essential in order to arrive at a decision as to whether parole would be granted (79, 80).

Allgood on cross examination testified that Government's Exhibit 1F, a report numbered 792, was the report received by the U.S. Attorney of the Eastern District of New York in this case, where the inmate is to be considered for parole (82). In this case no other United States agency requested information as to Otvos (84). It was not the policy of the parole authorities to notify the Attorney General when parole was granted (86).

Next the Government called James Bradley, an agent of the Drug Enforcement Administration (90). On direct examination he testified that either in November or December of 1974 he was investigating Otvos (91). He caused Otvos to be transferred from Atlanta to Newark, New Jersey for questioning (91). That in December 1974

Otvos was institutionalized at the West Street House of Detention and Bradley participated with another agent in interviewing Otvos (92). The other agent who participated in the interview was Anthony Mangiarcana (92). Bradley told Otvos that he was under suspicion of participating in narcotic activities while he was an inmate at Atlanta. Otvos denied this. Bradley told him that the authorities intended to charge him with narcotic trafficking and Otvos told the agent that the conspiracy laws of the United States were unfair as he never sold or possessed narcotics at Atlanta (93).

Further Otvos refused to cooperate with the authorities (93, 94). However Otvos admitted knowing the petitioner but he was not asked by the agent whether he was colluding with the petitioner (94). Nor was Otvos ever asked whether he was involved with Verzino, Perna and others (95). Otvos however told this witness that he was eligible for parole in May 1975 (96). Government's Exhibit 2 was identified as a report the agent made in regard to Otvos (96). Bradley admitted that the authorities knew that Otvos was involved allegedly with the petitioner in narcotic trafficking (96). However Otvos was never asked as to his involvement (97). Further that in December of 1974 there was an "on-going" investigation of the other defendants and co-conspirators and Bradley testified he did not want to refer to them when he was questioning Otvos (97, 98).

This witness learned that Otvos was deported one week after he was indicted (98, 99). The date of the indictment was April 1975 (99). This witness never contacted the Atlanta institution in regard to Otvos at the time he made a report marked Government's Exhibit 2A (99). There was another report by this agent designated Government Exhibit 2B which was dated June 3, 1975 (99).

The Court's Exhibit 1 consisted of a file from the Immigration and Naturalization Service and the Court found that the contents were irrelevant to this case (102).

On cross examination this witness admitted that in November of 1974 when he interviewed the petitioner he never discussed the possibility of an indictment naming him (102, 103).

But in July 1974 this witness might have discussed the petitioner's involvement in the narcotic activities at Atlanta (103). This interview took place in Newark, New Jersey (103, 104). It was also admitted by this witness that the authorities believed that the petitioner was involved in the activities at the institution (104, 105).

Referring to the transportation of the petitioner and Otvos to Newark, New Jersey, this witness testified that the petitioner was told that his brother was already indicted (108, 109). Moreover the agent considered that the others would be indicted together with Otvos (107, 108). That since one Anthony Stassi, brother of petitioner was already indicted, this witness might have related this to the other agent that a superseding indictment might be sought (108). Bradley's superior was an agent named Anthony Bocchiochio (109). Bocchiochio was in communication with the U.S. Attorney named Harry Batchelder (109). In December or January 1974 the U.S. Attorney was communicated with by the agents. Also this agent spoke to Otvos and a Francisca Williams about the deportation of Otvos. Williams was with the Eastern District Strike Force. She was conducting an investigation for the Board of Parole regarding the relationship of Otvos with organized crime (109-111). The only information he related to this agent was that Otvos was eligible for parole in May 1975. He also had discussions over ten times with the U.S. Attorney about the possible indictment of Otvos in December 1974. However he had no discussions with the immigration authorities (112). Petitioner's Exhibit A was characterized as a personal history sheet of Otvos that was prepared by this witness January 1974 (113). However this agent did not file that with the immigration authorities (113, 114). Nor did he not know that the report was in the file of the Immigration and Naturalization Service (114).

The statement by Otvos to this witness denying any participation in narcotic trafficking at the Atlanta institution was communicated to the superior of this witness, one Boccia (118). Around November 7, 1974 Otvos' involvement came to this agent's attention (117). But when Joseph Stassi was interviewed in July 1974 this witness did not have any knowledge of Otvos by "name" as being involved (118). Nor did this witness believe that other agents knew that Otvos by "name" was so involved. However other agents might have known that a "Frenchman" was involved (118).

There was further testimony that there was a liaison between the Drug Enforcement Administration and the French National Police but the witness was not sure whether that relation specifically involved narcotic offenders to be deported to France from the United States (129). In 1973 the witness first learned of the petitioner's possible involvement and he learned that from Perna. But at that time he didn't learn of Otvos (131). Either in December 1974 or January 1975 the agent learned of the petitioner's alleged involvement from Verzino (131). He also learned of Otvos' participation either in October or November 1974 (131, 132).

The witness anticipated the indictment of Otvos in January 1975. However he never communicated with the Bureau of Prisons or the Board of Parole to ascertain whether the release date given to him by Otvos was correct (133).

Carlo Boccia, another federal agent testified (135). He was affiliated with the Drug Enforcement Administration and he testified that he was a group supervisor. Either in November or December of 1974 he interviewed Otvos with another agent (136). He also questioned Otvos as to the petitioner and Otvos told him that he knew the petitioner (137, 138). It appeared that Joseph Stassi was transported to Newark, New Jersey with Otvos (138). However the witness could not recall whether he ever asked Otvos whether he and the petitioner were involved in narcotic transactions. He did ask Otvos to cooperate (138).

Boccia admitted that when he questioned Otvos there was a pending investigation as to the participation of Otvos with the petitioner in regard to narcotics (139). That he may also have questioned Otvos about Perna and Verzino (139, 140). Boccia admitted that there was "mention" about Otvos' eligibility or possible release on parole (140). However neither this witness or any other agent had any contact with the Parole Board or the Immigration and Naturalization Service about Otvos (140).

On cross examination Boccia admitted that when Joseph Stassi was interviewed in New Jersey, the witness believed that he was questioned about Otvos (145). The investigation concerned narcotic transactions at the institution in Atlanta.

There was also read into the record a communication that Otvos was set for parole and deportation March 3, 1975 and was expected to arrive in Paris March 4, 1975 (153, 154).

Anthony Mangiaracina, another federal agent with the Drug Enforcement Administration testified (154). On direct examination he testified that in 1974 he was stationed at the Newark District Office (155). He attended the questioning of Otvos (155, 156). Otvos was asked whether he would be cooperative and whether he knew the petitioner Joseph Stassi (156). Otvos replied that he was "not affiliated" with the petitioner and this witness stated he "must have" questioned Otvos about narcotic trafficking with the petitioner. Otvos denied this (157).

This witness was told by Bradley, the prior witness who also was an agent, that the involvement of Otvos consisted of procuring narcotics from Europe (160).

At this hearing the petitioner also testified (176). He related that he was removed from Atlanta to Newark July 4, 1974 (176, 177). He was questioned by three agents and the U.S. Attorney (177). At that interview he told them that he

had no relationship with the "Frenchman" and that aside from knowing inmates, such as Perna and Verzino, he had no other relationships (178). At a second interview he was questioned about Otvos who was also transferred with him to Newark (180).

Joseph Stassi told the Court that if Otvos were available he would call him as a witness (181). That Otvos would be called as a witness to rebut or deny what the Government witnesses Verzino and Perna would testify to (181). That without Otvos, Perna and Verzino could testify as to anything (181).

In April 1975 the petitioner first learned that he was indicted (181, 182).

The record shows that the Government did not know where Otvos was located at the time of the trial (190).

The Court's findings are found on pages 193-195 of the Appendix filed in the Court below.

THE FACTS

Mario Perna testified for the Government (209). He formerly was an inmate at Atlanta (210). He entered into narcotics trafficking there with Verzino (210). Verzino and Perna planned to contact "whatever" Frenchman they could in order to import narcotics (210). Perna met the petitioner Joseph Stassi in 1969 (210, 211). Joseph Stassi was known to him as the "old man" (211). He also met Joseph Condello and Sorenson, as well as other inmates (212). Perna would have Verzino close with the petitioner Joseph Stassi and one Kapatos (214).

Perna and Verzino spoke to Otvos about importing narcotics and Otvos replied that there was "no problem" provided they had an outlet in the United States who could handle the import (215).

Perna and Verzino were not successful in procuring an outsider. Verzino and Perna spoke to Joseph Stassi in January or February 1970. Joseph Stassi allegedly told him that he would speak to his brother, Anthony Stassi (217).

Ultimately Verzino stated he would arrange with Otvos for a letter of introduction to Otvos' contact in France, so that Anthony Stassi could meet the persons who would arrange for the exportation to the United States (219). Verzino finally obtained this letter which was written in French on onion skin paper so that it could be concealed (219). It was addressed to the brother of Otvos in France (219, 220). Perna learned that petitioner Joseph Stassi had a visit from his brother Anthony Stassi in the beginning of 1970 (220, 221). Joseph Stassi allegedly told Perna that his brother would go to France to make contact and that upon his return Anthony Stassi would let Joseph Stassi, the petitioner, know the results of the visit (221). According to Perna there was also talk of procuring the purchases of the import and the "Malizia brothers" were mentioned (221, 222). Perna also spoke about one Sorenson as being a possible outlet or dispenser of the narcotics (222, 223). This was explained as concealing Anthony Stassi as being active in the enterprise (223, 224). There was also a proposal that Anthony Stassi would operate with Sorenson upon Sorenson's release from the institution (225, 228).

Perna further narrated as to how the proceeds would be divided between him and Verzino (227, 228). Thus according to Perna, Joseph Stassi met Sorenson and there was a discussion as how Sorenson would meet Anthony Stassi when Sorenson was released (229, 230). In November or December of 1970 Sorenson was released.

In a later conversation with the petitioner Joseph Stassi, Perna and Verzino were told that Anthony Stassi was in France and arrangements there were made. That the brother of Otvos initially was reluctant to deal with Anthony Stassi but it was finally agreed upon because Otvos' brother had a common acquaintance named Mondolone who knew the petitioner (232).

Subsequently the petitioner received visits at the institution from his brother Anthony Stassi (232, 233). Perna also testified that Anthony Stassi met the Malizia brothers also known as the Pontiac brothers and that a shipment from France was anticipated (233). That the Frenchman was to communicate with Anthony Stassi by way of a "letter drop" in New York City (234).

Perna also explained that his share of the proceeds was changed from cash to narcotics (for resale) (234, 235). Verzino's outlet was to be "Suzie" who would get the narcotics from Sorenson (235). Suzie was Verzino's wife and her full name was Susan O'Neill (236).

Perna was also told by the petitioner that his brother, Anthony, missed meetings in New York because of late deliveries at the "letter drop" (237, 238).

Finally in October 1970 the petitioner told Perna that the deliveries were made and that future deliveries were anticipated (239, 240). Further that Anthony Stassi personally delivered narcotics to the Pontiac brothers and was paid (241).

Meanwhile Perna would have Verzino telling him that Sorenson received the delivery but this was from a source other than the petitioner (241, 242). It next appeared that Sorenson had a disagreement with Suzie over $2,500 and was therefore disinclined to make any deliveries to her. This was in October 1970 (242, 243).

Continuing his narrative, Perna related that Verzino told him that Joseph Stassi told him that the balance of the export was delivered. That Joseph Stassi told his brother to settle the dispute between Suzie and Sorenson (243-247). Perna believed that the total quantities that were imported were between 130 to 140 kilos (244).

Perna was allegedly told by the petitioner that his share in the enterprise was to be two (2) kilos of heroin plus a bonus of another kilo (249). Verzino also told Perna that Anthony Stassi told his brother, the petitioner, that a third delivery was expected in January 1971. It appeared that

this never arrived and this was discussed with the petitioner, Verzino and Otvos (250, 251). Otvos, according to Perna, also stated that his brother in France was "looking out for his end" (251). Joseph Stassi told Perna that his brother was waiting to hear about the third load that never arrived. This was in March 1971 (252).

Perna also recounted many conversations with Otvos (252).

Perna spoke to Otvos who told him that "Frenchmen" and South Americans were asked by Verzino for their addresses as he wanted to transact with them. When Otvos confronted Verzino about this, Verzino denied this (255, 256).

According to Perna, disharmony arose between Verzino and Joseph Stassi because Verzino was talking to other inmates at the institution about the narcotics business. Otvos allegedly told this to the petitioner (256).

It next appeared that "Suzie" who was affiliated with Verzino, was also talking about Sorenson's way of life since he acquired his newly found source of income (256, 257). As a result there was attributed to the petitioner a statement that it was necessary to murder Suzie, Sorenson and Verzino (257-259).

The petitioner allegedly asked Perna to send him some poison after Perna was released so that it could be administered to Verzino by the petitioner himself (259). Further that Anthony Stassi would help Perna kill the others (260). The petitioner allegedly also told Perna not to discuss the narcotic venture with Verzino (264).

When Perna was released he was to meet Anthony Stassi (265, 266).

Perna was released May 5, 1972 (265).

"Suzie" paid Perna for his share of the venture by giving money to his niece (266).

Perna also described his meetings with Anthony Stassi after his release from the institution (267-269).

Perna finally related how he and Anthony Stassi planned to kill Sorenson (273, 274).

Having earned his freedom Perna described how he met Malizia and agreed to go into the narcotic business with him (275, 276).

Upon release, Perna offered to buy the narcotics from Anthony Stassi that would be imported from Mexico. Malizia also allegedly told Anthony Stassi that he would have purchased the import from Mexico. Subsequently and after release, Perna met Sorenson who told him that he heard from the "old man" (277-282).

Anthony Stassi also told Perna that he went to France and expected a shipment from Canada asking Perna and Malizia whether they would be interested in purchasing it (282, 283).

Perna also spoke to Verzino after Verzino was released and was told that the petitioner was to call his wife's home and that Verzino was to be there to receive the call (288).

On cross examination Perna stated that the petitioner had no stake in Perna's gambling and narcotic business conducted at the institution (289). That Malizia and Perna entered into another narcotic partnership. That one "Tony West" was his other source of narcotics (290).

That he planned to kill Verzino because Verzino was talking about the narcotic activities that Perna was engaging in with his new partner, Malizia (292).

When he first began cooperating he never referred to petitioner (283).

Perna also narrated his various jail escapes but stated that the petitioner had nothing to do with those (294).

Finally, Perna admitted that lying was part of his lifestyle (300).

On re-direct examination, Perna testified that when he was recaptured after his jail break he told Bradley, the agent, about transactions and conversations with the petitioner, Otvos and the others (305).

Next Joseph Condello was called by the Government (306). He knew the petitioner, Sorenson and Anthony Stassi, as well as others (307, 308). He met the petitioner at the institution in Atlanta. Condello was an inmate from 1968 to 1972 when he was transferred to another institution (308, 309). However while at the institution in Atlanta he did not associate with the petitioner (309, 310). But he knew that the petitioner was also known as the "old man" (311). He also knew "Jean Claude" but didn't know his last name (312). He heard Verzino, Sorenson and Perna talk about importing narcotics from France through Canada (315, 316, 319). He also heard the petitioner mention Verzino (320, 321). This was in connection with killing Verzino and "Suzie" (322, 323). He claimed that the petitioner stated that it was best that Verzino not be killed (323). Later he spoke to the petitioner who mentioned about Condello getting into the narcotics business after he was released from the institution and stated he would get in touch with him. The last time he saw the petitioner was at the institution in Atlanta (325-327).

On cross examination he testified that Perna and Malizia were his source of narcotics (336). This was distinct from the petitioner (337).

When he started to cooperate the agents told him that they would try to help him (337). Condello spent 1200 days at the institution in Atlanta and the only time the petitioner asked to talk to him was when he was being released (354).

Next, James Bradley an agent with the Drug Enforcement Administration testified (361). He told the jury that Perna was arrested February 1, 1974 (363). Between November 1973 and February 1, 1974 Bradley met with Perna and Condello. Bradley acting in an undercover capacity obtained narcotics from Perna (363). On December 27, 1973 Perna and Condello met with him (363). Perna told him that he did not deal with Anthony Stassi (364). This related to a shipment of narcotics that was to be exported from Canada, Perna explaining that Malizia, his partner, was not interested (364, 365).

When Bradley interviewed Condello after Condello's arrest, Condello told him of the conversation he had in October 1973 at the institution in Atlanta (369). Condello also told Bradley that he conversed with the petitioner about his joining with the petitioner after he, Condello, was released (367). Also during his cooperation with Bradley, he related the episode as to importing poison into the prison so that the petitioner could kill Verzino (367).

Apparently Bradley also interviewed Perna after his arrest and Perna told him of his conversation with Otvos (369-374).

Bradley was then allowed to give his summary of the facts as part of the evidence in this case.

The next witness the Government called in regard to the petitioner was Anthony Verzino (393). Part of his penal background can be gleaned from pages 394 to 395 of the Appendix. He also admitted testifying falsely in his own trial (395).

Verzino arrived at the institution in Atlanta in 1967. He met the petitioner there for the first time (396). The petitioner was known to him as "Joe Rogers" and the "old man" (396). Verzino also identified other defendants in the courtroom who were inmates at that institution in Atlanta (397, 398). Finally, he testified he met Anthony Stassi (399). Verzino then described his partnership with Perna at Atlanta which involved narcotics (400). He further testified as to others he met including Condello, Sorenson and Kapotos (400, 401).

Verzino described his liason with Otvos. His meeting with Otvos arose when the petitioner asked him to ask Otvos about a person named Montelone, whom the petitioner allegedly knew (401, 402). Otvos told Verzino about a narcotics distribution through Sorenson (403). Verzino spoke to Perna about this (404, 405).

At a later meeting, Otvos told Verzino that he was trafficking in narcotics while imprisoned at Atlanta (405). The outside conduit for the distribution was one Ralph

Santana, but Otvos told him that he had difficulty with Santana (405, 406). Otvos then asked Verzino whether he could handle the distribution (406). Verzino spoke to the petitioner who complained of the high price that Otvos wanted (406, 407). Eventually the arrangement came to fruition (408, 409, 416). The source was to be Otvos' brother in France (409), and a scheme was hatched as to how the brother of Otvos would be assured that the representative that was sent to him was trustworthy (409-411).

It appeared that the petitioner's brother Anthony Stassi was to be the emissary to the brother of Otvos (411). Verzino described the address where the brother of Otvos could be found (411, 412). There was a further description of how a note written on onion paper would be given to the brother of Otvos unsigned by referring to an incident between Otvos and his brother so that the brother would know that Otvos was the communicant (412-414). The courier to France was to have the name "Duval". This was to be Anthony Stassi (415).

Verzino also conversed with the petitioner as to how Anthony Stassi would meet the brother of Otvos in France and arrange terms (417, 418). Verzino also spoke to Perna about this and discussed how he and Perna would take their profits, that is, either in cash or narcotics, also discussing the distribution of the narcotics with Perna (417-420). "Suzie" was identified as Verzino's wife.

According to Verzino, the petitioner found out that his brother Anthony, succeeded in having the narcotics exported from France (422-424). Verzino also told the petitioner that he wanted his profit in narcotics with an option to purchase narcotics wholesale (424). Finally, the petitioner was said to have told this witness that his brother met some "Frenchman" in New York and arrangements were made for deliveries (427). In the summer of 1970 the petitioner and this witness spoke to Otvos about delays in the shipments, and Otvos told them that the narcotics

would come from Canada (429, 430). Finally, Verzino's wife Suzie told him that Sorenson delivered two (2) kilos of heroin to her and described how she disposed of them (430, 431). The petitioner also told him that 120 kilos of heroin were received (431, 432). Later the petitioner told him that he disapproved of Verzino's wife Suzie being involved (433).

In another conversation with Verzino, the petitioner allegedly told him of another shipment of 140 kilos of heroin (436). In regard to a third shipment, this never arrived although the petitioner allegedly spoke about it (438, 440). Later, clouds appeared on the horizon when it was discovered that money was missing and that Sorenson was involved in this. Verzino spoke to Perna about the petitioner's suspicion of the others not accounting for the proceeds of the sales (442, 443). There was also a conversation attributed to the petitioner regarding the seizure of narcotics in France and also that Anthony Stassi was offered narcotics in Canada (447, 448).

When Verzino was released, the petitioner told him to wait until he heard from Anthony Stassi who would communicate with him. At any rate, Verzino told Stassi that he intended to start his own narcotic enterprise (449). He then described his relationship to the Malizia brothers and also getting narcotics from other sources (452-454).

Verzino was arrested February 25, 1974 (462). He agreed to cooperate with the authorities in August 1974 (464).

Verzino also denied that while incarcerated in Atlanta, the petitioner Joseph Stassi observed him in a homosexual act (515, 516). Further that he never told the petitioner he would "get even" with him because the petitioner caught him in such an act (516).

The Government also called an agent named Korniloff (525). According to him he participated in interviewing Verzino in March of 1975 with the Government attorney who prosecuted this case participating (525, 526). The U.S. Attorney told Verzino of a plot to kill him, his wife and Sorenson, and that the petitioner was involved in it (526). Verzino told this witness he didn't believe that (527).

Later Verzino recounted the petitioner's involvement and Korniloff, in effect, summarized the evidence in this case coming from Verzino (528-531).

THE DEFENSE:

The petitioner put in a defense by calling various witnesses who were inmates at the Atlanta institution or who otherwise knew the witnesses who testified against him, namely Perna and Verzino. Additionally, the petitioner himself testified and denied that he participated in any narcotic transactions with Verzino, Perna or Condello.**

Joseph Stassi testified. He explained that he was to be paroled December 14 1975. That he was married and his wife's name was Frances and she resided at 1944 East 21st Street in Brooklyn, and he was the father of two children (602, 603). He described his prison life, having been sentenced in 1967. His record in the institution was clear and he was never subjected to any disciplinary action (603, 604).

Asked about the charges that he was on trial for, the petitioner clearly stated that he was not guilty, that he never entered into any agreement with Perna, Verzino or anybody else, including Otvos (606). He denied that he ever spoke to Perna or Verzino or Condello about importing narcotics into the United States (606, 607). Furthermore, he never discussed having poison brought into prison to kill anybody (607).

**It is to be noted that the Court below held in *U.S. v. Frank*, 494 F. 2d 145 (Cir. 2d, 1974) at page 153 that:

> "In passing upon the sufficiency of the evidence, the Court had only the prosecution's case, the defense having offered none . . . But the self-incrimination clause does not elevate a defendant's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for the jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible, exculpatory version . . ."

In regard to Perna, petitioner testified that he never had any real personal discussions with Perna, but merely knew him because he was an inmate (608). He also had at most, a casual relationship with Sorenson, namely he was never intimate with him or ever had any personal discussions with him (609, 610). Nor did he know the co-defendant Alaimo.

Stassi related that he was friendly with Verzino (610). Their relationship began when he found out that Verzino's probation report related to him and that aroused his interest and then he became friendly with Verzino (611, 612).

In regard to his previous conviction, the petitioner denied that he was guilty and explained the review of that conviction that he was pursuing (612, 613). Furthermore, Verzino apparently was helping him because according to petitioner, Verzino knew the law (613, 614). He also described litigation regarding his parole status (615).

Verzino did speak about his narcotic activities (616). Verzino told the petitioner that when he was released he was going to go into the narcotic business. The petitioner explained Mondolino as being a co-defendant of his in a prior case and that Verzino knew that fact (617, 618). However, the petitioner did not know Mondolino, who was a Frenchman (618).

The petitioner explained that his wife knew Verzino's wife, that they lived in the same neighborhood and Verzino's wife would visit. That when Verzino called his wife who did not respond to the telephone call, he would call Stassi's wife so that she could call his home to find out whether his wife was there (621).

He then described the homosexual incident involving Verzino and somebody else (622-624). Discovering Verzino's sexual tendencies, he told Verzino not to bother with him (622-624). He thereafter ignored Verzino (625).

Verzino's wife lived near the premises where the petitioner's wife lived, as he previously testified. When the petitioner called his wife, Verzino was there and he spoke to him (626, 627).

Next, the petitioner called various inmates to testify as to the activities of Verzino and Perna at the institution. These persons testified that there was an incident where the petitioner saw Verzino committing a homosexual act and told him to stay away from him (561-563, 568-571, 579-581). As a matter of fact, Harold Robbins, an inmate, testified that he participated in a homosexual incident (587, 588). That Verzino even before being discovered by the petitioner, had a homosexual relationship with this inmate (588, 589). The incident occurred at the prison library and Verzino was observed cursing the petitioner who was walking away from him. Verzino openly threatened to kill the petitioner and stated that he would seek revenge (595-598).

The witness further testified that in boasting about his narcotic activities, Verzino never mentioned the petitioner but did say he would frame the petitioner (706-708).

Evidence was adduced that Verzino spoke to an inmate about importing narcotics and asked the inmate whether he knew "Latins", further asking the inmate to make a connection for him but never mentioning the petitioner (713-717, 720-721).

Perna discussed his involvements with the law and told inmates that the authorities were pressuring him to build a case against the petitioner (721, 759).

Other witnesses testified as to the criminal activities of Perna and Verzino while they were institutionalized at Atlanta (738, 739-741). Neither Perna nor Verzino ever mentioned the petitioner (741, 742). Another inmate testified that he knew Condello, Perna and Verzino (773). He casually knew the petitioner (774). That he never heard the petitioner say he was going to kill Verzino (775).

A Frenchman named Orsino, testified he was also an inmate; that he knew Verzino who asked him whether he could arrange any source of narcotics in France (789-791).

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITIONER WAS DENIED THE RIGHT TO CALL A WITNESS IN HIS DEFENSE AND OTHERWISE WAS DEPRIVED OF DUE PROCESS OF LAW BY THE DEPORTATION OF OTVOS.

The conspiracy count was the basis for the case against the petitioner. On this count the government was able to impose liability under the substantive counts, see *Pinkerton v. U.S.*, 328 U.S. 640 (1945).

As is so familiar with the proving a conspiracy charge, this Court characterizing such in *Anderson v. U.S.*, 417 U.S. 211 (1974) at page 224 as:

> ". . . We have indicated in the related context, charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes . . . " (Omitting internal quotations and citations).

Moreover, in conspiracy charges, out of court statements by accessories mouthed by testifying witnesses is a common type of evidence and such are admissible under Rule 801(d)(2)(E), as not being hearsay.

Hence it was cardinal to the defense in this case that petitioner have recourse to Otvos, the "French connection". Calling an accomplice as a witness is not an uncommon practice. See *Washington v. Texas*, 388 U.S. 14 (1967).

In *Webb v. Texas*, 409 U.S. 95 (1972), prior to a defense witness testifying, the Court warned the potential witness of the consequences of perjury. The witness then refused to testify. This Court held that the petitioner was deprived of due process of law (14th Amendment in such case, 5th

Amendment here).

In *Cool v. U.S.* 409 U.S. 100 (1972), the jury was instructed to disregard the testimony of a defense witness unless the jury was satisfied of the witness' testimony beyond a reasonable doubt. This Court held that the trial judge was in error in rendering an accomplice charge as to a defense witness for jury appraisal. The basis of this Court's holding was the 6th Amendment right to compulsory process or to call witnesses.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973) at page 294 this Court stated in part that:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair trial to defend against the State's accusations. The right to confront and cross examine witnesses and to call witnesses in one's own behalf has long been recognized as essential to due process . . ." (Internal citations omitted).

It was further stated on page 302 of 410 U.S. that:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense . . ." (Internal citations omitted).

In *U.S. v. Mendez-Rodriguez*, 450 F. 2d 1 (Cir. 9th, 1971) a government policy to deport some aliens who were arrested for illegal entry into the United States was considered. The accused was charged and convicted in that case for a conspiracy to smuggle aliens. He was arrested while in the act of transporting the aliens. Some aliens were held as material witnesses by the government, some were deported. The accused moved to dismiss the indictment because some of the aliens he was with at the time of his arrest and were deported, may have been called as defense witnesses. These possible witnesses were deported to Mexico and their whereabouts were unknown. The motion was granted, it being held on page 5 that:

> "Appellant does not contend that the government, without more, is under an obligation to search out

and produce witnesses who may be favorable to the defense. He does contend, however, that it is a denial of due process if such witnesses have been made unavailable by the conduct of the government."

On page 5 of 450 F 2d it was stated that:

"Appellant concedes that he is unable to show that the witnesses in question would have offered the testimony favorable to the defense. Such statement is understandable in view of the fact that the appellant was, by government action, deprived of the opportunity to interview said witnesses. Appellant couldn't know what these witnesses might say, if anything. We are in the same position as the appellant. We decline to indulge in any speculation that the interviews would, or would not, have been fruitful to the defense."

The pre-trial evidentiary hearing as to this issue, showed negligence on the part of the government. Whether the authorities deliberately did this or not is irrelevant, and in the bureaucratic maze presented, it would be impossible to show any deliberate suppression of Otvos as a witness. In short, to paraphrase a recent holding of this Court in *Flint Ridge Development Co. v. Phoenic Rivers Association*, 49 L. Ed. 2d, 205 (1976), at page 216, Otvos was submerged and " . . . Shunted aside in the bureaucratic shuffle . . . "

The findings of the trial court were to the effect that the parole board was grossly negligent (193). The Court however found that there was no negligence on the part of the United States Attorney or other agencies (193, 194).

It would seem that if the United States Attorney went to the Court for a conviction, the government of the United States was represented by such United States Attorney of the Department of Justice. As was held in *Giglio v. U.S.*, 405 U.S. 150 (1972), at page 109:

"In the circumstances shown by this record, neither . . . authority nor its failure to inform his

> superiors or his associates is controlling. Moreover, whether the non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the government . . . "

The record shows that representative of the Department of Justice were in contact with Otvos, and a study was being made of his background and his relationship with organized crime (109-111). It would have been a telling defense before the jury to have presented proof through Otvos that he and his brother or whatever his gallent compatriots were supposed to have a role in the Perna-Verzino multi-national venture, did not exist or if existing were not participants. Otvos was a defendant. But Otvos may have elected to take the stand himself.

At the hearing a government witness testified that Otvos told him that he did not participate in any narcotic trafficking at the Atlanta institution (118). There was further testimony as to the denial by Otvos of his participation in narcotic trafficking at the institution (93).

In *U.S. v. Tsuttagawa*, 500 F. 2d 420 (Cir. 9, 1974) it was stated on page 422 in part that:

> "Since the government investigators are not equipped with crystal balls to determine unexpected or unforeseen results, there may be some circumstances in which Mendez-Rodriguez will not apply. However, this is not such a case. Before the apprehensions, the government had a reasonably small, known and identifiable number of targets, although names of potential defendants may not have been known. . . . "

It was further stated on pages 422-423 that:

> ". . . Mendez-Rodriguez prevents the government from determining who will be a helpful witness for the accused. The accused . . . has a right to make that decision for himself, either by interviewing the potential alien witnesses or by waiving the right to do so. . . . "

See also *U.S. v. Bell*, 506 F. 2d 907 (D.C. Cir., 1974), footnote 113 at page 222.

As was stated in *U.S. v. McQuillan*, 507 F. 2d 30 (Cir. 9th, 1974) at page 33:

> ". . . There is no connection whatsoever between the aliens and the crime defendants were committing . . . "
>
> "In sum, Mendez-Rodriguez is inapplicable to the instant case because there is nothing to indicate that the aliens here were witnesses to the crime of which appellants were convicted and nothing to indicate the barest possibility that their testimony could have been of any benefit to the accused."

However, in the present application, there was testimony by the government witnesses that Otvos denied any complicity in the crime. It would seem to follow that if Otvos denied complicity in the crime, this would work to the petitioner's advantage.

Unlike the ordinary case where a petitioner or an accused complains that evidence should be suppressed, on the contrary in this case, the petitioner's thrust is to the very integrity of the fact finding process. See *U.S. v. Agurs*, 49 L. Ed. 2d 342 (1976) where dealing with the prosecutor's duty to divulge exculpatory evidence, this Court realistically noted on pages 354-355 that:

> "The proper standard of materiality must reflect of overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt and did not otherwise exist, constitutional error has been committed. . . . "

In this case, the government's case against the petitioner was supported by three disreputable witnesses. The record is complete with statements, utterances, all mouthed by the three accomplices whose sordid backgrounds were set forth

in the record. True the petitioner testified. It is also true that a number of witnesses testified in his behalf. But the cardinal link in this case was Otvos himself. The petitioner would have had a better chance before the jury if Otvos were a witness. This went to the integrity of the fact finding process.

The Court below cited *U.S. v. Quinn*, 445 F. 2d 940 (Cir. 2d, 1971) *Cert. den.* 92 S. Ct. 87. That case, it is suggested, is inapplicable. There the accused complained that due to a pre-indictment delay possible defense witnesses were dead and hence no longer available. However the government in that case was not responsible for the death of three possible witnesses.

Furthermore, *U.S. v. Finkelstein*, cited in the Court below, 527 F. 2d 517 (Cir. 2d, 1975) *cert. den.* 96 S. Ct. 1742 is also inapplicable. Finkelstein dealt with a denial of a pre-trial motion for a severance of the parties so that some could be called as witnesses. But in this case, the petitioner Stassi was deprived even of his right to move for a severance because Otvos was not available. The government severed in this case, but the severance was to the detriment of the petitioner. In regard to Finkelstein, the petitioner wishes to add that this Court should view Finkelstein in the light of a statement in *U.S. v. Crane*, 499 F. 2d (Cir. 6th, 1974) at pages 1387-1388 to the effect that:

> " . . . Given what appears to be an ever increasing demand by litigants for access to federal courts, efforts by trial judges to keep their dockets current are to be commended. Yet justice, not judicial economy is the first principal of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial."

As was stated in *U.S. v. Ballesteros-Acuna*, 527 F. 2d 928, (Cir. 9th, 1975) at page 930:

> ". . . It is well established that an accused's right to obtain the testimony of witnesses and compel

> their attendance is a fundamental element of due process of law . . . This Court has held however, that the government is under no obligation to look for a defendant s witness, in the absence of a showing that such witness was made unavailable through the suggestion, procurement or negligence of the government . . . " (Omitting internal quotations and citations).

As stressed, Otvos was an integral part of the occurrences testified to by the government witnesses. Aside from petitioner's argument that the petitioner was deprived of his right to call witness, it may also be argued that the government itself had a duty. Of course if the government were compelled to have Otvos present, the government could not call Otvos as a witness if he were on trial, because Otvos might have claimed the privilege against self-incrimination. That may be so, but nevertheless, whether the government had a duty to call Otvos, the petitioner certainly had the right. However it may be of interest to the Court to mention the 1966 Volume of the Washington University Law Quarterly, at page 68, et seq. "Notes Duty of the Prosecutor to Call Witnesses whose Testimony will Help the accused to Establish his Innocence." The thrust of that note was that the government cannot select the facets of an entire transaction and present them to the trial jury. That the government had a duty to call all those persons who were part of the "res gestae".

POINT II

THE COURT IN EFFECT, DIRECTED THE JURY TO FIND THE PETITIONER GUILTY OF THE SUBSTANTIVE COUNTS.

The Court instructed the jury pursuant to *Pinkerton v. U.S.*, 328 U.S. 640 (1945). The Court's charge was to the effect that if the petitioner was found to be a member of the conspiracy by the jury, the jury could also find the petitioner guilty under the substantive counts. The Court left no room in its charge for the jury to acquit the petitioner of all or some or none of the substantive counts. Even if the jury found the petitioner guilty of the conspiracy, (1070, 1071, 1040, 1041, 1068).

It is respectfully submitted that the holding in Pinkerton, while correct as applied by the Court, nevertheless did not hold that the jury must find an accused guilty of the substantive crimes if the accused is a member of the conspiracy.

This is exactly the purpose of the jury system. In *U.S. v. Dunn*, 284 U.S. 390 (1942) this Court held that inconsistent verdicts rendered by a jury are quite proper. Each count of an indictment is a separate indictment by itself. The joinder is for the convenience of the government and is a method for achieving economy; see also *U.S. v. Maybury*, 274 F. 2d 899 (Cir. 2d, 1960); *U.S. v. Dotterweich*, 320 U.S. 277 (1943), opinion of Mr. Justice Frankfurter.

It is also true that there was no exception taken to this charge.

However, it is respectfully submitted that the right to have a jury consideration of the facts is so fundamental that in a criminal case a court's direction to a jury to find a verdict of guilty is plain error under Rule 52(b) of the Federal Rules of Criminal Procedure, supra.

POINT III

THE COURT BY DIRECTING THE JURY TO FIND A SPECIAL VERDICT AS TO WHEN THE PETITIONER BECAME A MEMBER OF THE CONSPIRACY PREJUDICED THE PETITIONER'S RIGHT TO A FAIR TRIAL AND A FAIR JURY CONSIDERATION.

The first count of the indictment charged a conspiracy commencing on or about January 1, 1970 and continuing to and including December 30, 1972. The date of the last overt act was alleged to be on or about June 1971. The statutory predicates for that conspiracy count were former Sections 173 and 174 of 21 U.S.C. and the succeeding sections found in 21 U.S.C. 812, 841, 846, 963.

Sections 173 and 174 of 21 U.S.C. were repealed before May 1, 1971, that being the cut-off date. Thereafter, the new sections dealing with narcotic offenses went into effect. See *Bradley v. U.S.*, 410 U.S. 605 (1973).

The Court's charge to the jury was to the effect that the petitioner could be convicted under the substantive counts if the jury found him to be a member of the conspiracy and that the acts constituting the substantive counts were performed pursuant to the conspiracy (1071, 1072). See *Pinkerton v. U.S.*, 328 U.S. 640 (1945).

However at the conclusion of the Court's charge the Court informed the forelady that a form known as "Specimen Verdict as to Each Defendant" was available for the jury to record the verdict. Then the Court stated as follows:

> "I want to call your attention to the last paragraph of that copy: 'In the event of a guilty verdict on count 1 (conspiracy) answer the following questions: did the defendant become a member of the conspiracy before or after May 1, 1971? Before — After—.' " (1080, 1081).

It would seem that the purpose of this type of instruction was to impose the mandatory penal liability under the then formerly existing sections found in 21 U.S.C. 173 and 174; see *U.S. v. Bradley, supra.*

Coupled with that instruction was the Court informing the jury that the jury didn't know the "details" of that question but that it was "procedurally important", the Court stating that it would not give the reasons to the jury.

It is respectfully submitted that this type of procedure constituted a direction to the jury to arrive at a special finding. Rule 31 of the Federal Rules of Criminal Procedure relates to the verdict. It has five (5) subdivisions. Subdivisions (a) to (d) describe the disposition the jury can make. There is not one provision in there that provides for the procedure adopted by the Court below.

Meanwhile subdivision (e) of Rule 31 headed "Criminal Forfeiture", supra, provides that if the charge alleges an interest or property subject to a forfeiture, then a special verdict should be returned by the jury to the extent of the property interest. This is the only provision it seems relating to special verdicts.

In *U.S. v. Spock*, 416 F. 2d 165 (Cir. 1st, 1969) at page 180 it was stated in part that:

> "Of more substantive importance is the fundamental difference in the jury's function in civil and criminal cases. In civil trials the judge, if the evidence is sufficiently one-sided, may direct the jury to find against the defendant even though the plaintiff entered into the case bearing the burden of proof . . . . In a criminal case the Court may not order the jury to return a verdict of guilty no matter how overwhelming the evidence of guilt . . . Put simply the right to be tried by a jury of one's peers finally exacted from the King would be meaningless in the King's judges could call the turn . . . " (At pages 180-181, internal quotations and citations omitted).

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On pages 182 it was further stated in part that:

> "We are less concerned by the jury's possible fear of subsequent criticism with respect to special findings than we are with the subtle and perhaps open direct effect that answering special questions may have upon the jury's ultimate conclusion. There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. A juror wishing to acquit may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant jury may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions."

It is submitted, that the Court's instruction to this jury prejudiced the petitioner when the jury was told it "didn't know the details" of the question but that it was "procedurally important" and finally the Court stating it would not give the reasons to the jury.

This could have led to jury speculation all to the prejudice of the petitioner. The jury may have felt that the enormity of the charges warranted this instruction by the judge.

The Court below on pages 252-253 of the opinion, dealt with this holding that it was proper because it was relevant to the sentence. However, this is not a case where the jury may hear evidence in order to determine the type of punishment to impose or not to impose.

The Court's questioning as to this also dealt with the issue that the jury was told that the petitioner could be found guilty of the substantive counts, if found guilty of the conspiracy.

This type of instruction, it is submitted, had a "chilling" effect on the deliberations of the jury, such a deliberation being a part of the fact-finding process, and being the special responsibility of the jury which spoke for the

sovereign. See *U.S. v. Maybury*, 274 F. 2d 899, (Cir. 2d, 1960).

The prosecution in framing the indictment joined two conspiracies in one count. There were two separate statutes that did not co-exist in point of time but succeeded each other. This, it is submitted, caused the resulting instruction of the special finding by the jury not provided for in Rule 31. Rule 8 of the Federal Rules of Criminal Procedure provides in subdivision (a) that offenses may be joined in one indictment in separate counts for each offense if the offenses are of the same or similar character. Two conspiracies can be joined in one indictment and in separate counts, even though they are overlapping acts, and it would seem that the two separate conspiracies can be charged in separate counts in an indictment where the statutes are different. See *U.S. v. Papadakis*, 510 F. 2d 287 (Cir. 2d, 1975), at page 296, it being held that:

> "While it is not unusual so to charge, there is no reason why people cannot enter into two separate criminal agreements more or less at the same time . . . If they do they come within the joinder rule F.R.C.R.P. Rule 8, subject to severance in the interests of justice . . . " (Internal citations and quotations omitted).

The Court below cited a ruling of the District Court for the Southern District of New York found in *U.S. v. Ogull*, 149 F. Supp. 272 (S.C.N.Y. 1957). In that case, however, the defense consented to the Court requiring the jury to make a special finding. It is difficult to understand how that case has any value as a precedent.

It is of course true that the defense did not take any exception but again, it is submitted this was plain error.

There was no showing and no claim that the omission on the part of petitioner's former counsel constituted trial strategy. See *Henry v. Mississippi*, 379 U.S. 443, 447, 449 (1965). Furthermore since the record is silent as to petitioner's former counsel's omission, one cannot presume the waiver of a fundamental right as was held by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972).

POINT IV

THE TRIAL COURT'S STATEMENT THAT THE PROSECUTION WAS FOUNDED ON THE GOVERNMENT'S BELIEF THAT THE PETITIONER AND CO-DEFENDANTS WERE GUILTY, PREJUDICED THE PETITIONER'S RIGHT TO A FAIR TRIAL AND THE MOTION FOR A MIS-TRIAL SHOULD HAVE BEEN GRANTED.

During the trial a motion was made for a mistrial because of the Court's comment that the prosecution thought that the defendants were guilty and hence instituted the action (375).

The evidence against the petitioner came mainly through the disreputable combination of Perna and Verzino. The lurid background of this case was the activities taking place in a penal institution, threats of violence, and all the other sordid aspects of a narcotics prosecution, required the most extreme caution so that the jury could fairly appraise the evidence.

A statement of the trial judge, carrying the prestige of a judicial office, it is suggested tended to prejudice the jury so as to render the jury incapable of objectively appraising the evidence. In other words, the Court's statements added the Court's prestige to the government's case. In *Palno v. U.S.*, 58 F. 2d 111 (Cir. 8th, 1932) it was held that while a federal judge can make some comments such should not be in the nature of an argument or display a partisan position. It was held that the comments, if made, should be full, objective and the Court should not by its statements give rise to an inference that it is not neutral.

The trial court did render a curative instruction to the jury (377-382). However because of the sordidness of this case, it would seem that the impression left with the jury either was not obliterated or could not be obliterated; see *Bruton v. U.S.*, 391 U.S. 123 (1968).

In *U.S. v. Salazar*, 293 F. 2d 442 (Cir. 2d, 1961), the Court inquired of a defendant when he was testifying whether he thought that the prosecutor or the Post Office Inspectors were fabricating a case against him. The conviction was reversed it being held that a curative instruction to the jury did not undo the prejudice. In *U.S. v. Woods*, 252 F. 2d 334 (Cir. 2d, 1958), it was held that where a Court's comments were extremely prejudicial a curative instruction to the jury was ineffective. In *U.S. v. Martinez*, 496 F. 2d 664, (Cir. 5th, 1974) *cert. den.* 419 U.S. 1051 held that a cautionary instruction was insufficient to overcome prejudicial impact of a judge's comment.

POINT V

THE PROSECUTOR'S SUMMATION EXCEEDED THE BOUNDS OF FAIR COMMENT

Following current practice, the prosecutor was afforded two summations while the defense only one. At page 831 of the Appendix the prosecutor stated to the jury that the witnesses who testified for the government were telling the truth and he referred to the "deals" with the government that were "conditioned" on those witnesses telling the truth (831-833). The prosecutor also informed the jury that the sentencing judge would consider in imposing a sentence on the government witnesses whether they "perjured themselves" (833).

The rebuttal summation of the prosecutor referred again to the fact that the government witnesses had a "deal" (1019). That the government witnesses "got a gun at their heads" (1019). The prosecutor further told the jury that truth was the only way out for the two witnesses at trial, Perna and Verzino. That the government told them to tell the truth and that deals were made "conditioned on telling the truth" and that the easiest way out for the government witnesses was to tell the truth (1019). Continuing his

rebuttal, the prosecutor told the jury that when the government witnesses were sentenced, the court would take into consideration "what these witnesses have done . . . that's what their deals require, that the Court be told all the crimes they have done, the Court be told everything about them." (1020).

One inference that could have been made by the jury, a jury of laymen, was that if the jury acquitted the petitioner the government witnesses would be perjurers, and that the future of the government witnesses depended on a conviction of the petitioner. The prosecutor by referring to a "deal" with the government endorsed the truth of the testimony of Perna and Verzino.

It is submitted that the prosecutor here was "vouching" for the veracity of the government witnesses in the most extreme way. In *U.S. v. Phillips*, 527 F. 2d 1021 (Cir. 7th, 1975), the prosecutor summing up told the jury that if the defendants were acquitted the jury would be ajudging the government as violating the civil rights of the defendants. That the jury would be finding that one government attorney conspired with a government agent. That if a government agent were not believed the jury would be finding that the government agent was committing a crime, at pages 1022, 1023. The conviction was reversed. Since the prosecutor represented the government, the duty imposed on the prosecutor was to seek justice rather than a conviction. See *Berger v. U.S.*, 295 U.S. 78, at page 88 (1935).

It is submitted that the prosecutor in this case commented on the credibility of the government witnesses. See *U.S. v. Ludwig*, 508 F. 2d 140, 143 (Cir. 10th, 1974).

Recently this Court dealt with the question of excessive summations by prosecutors in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). While that was a state conviction, and this Court held that no constitutional issue was presented for review, the prevailing opinion in this Court in footnote 23 on pages 648 did say:

"23. We do not, by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts, by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it. . . ."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

ARNOLD E. WALLACH
A Member of the Bar of
the United States
Supreme Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 113, 114, 115—September Term, 1976.

(Argued September 1, 1976 Decided October 26, 1976.)

Docket Nos. 76-1110, 76-1175, 76-1180

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH STASSI, a/k/a Joe Rogers,
ANTHONY STASSI and WILLIAM SORENSON,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from judgments convicting appellants of narcotics violations following a jury trial before Judge Whitman Knapp in the United States District Court for the Southern District of New York.

Affirmed.

ARNOLD E. WALLACH, New York, N.Y., *for Defendant-Appellant Joseph Stassi.*

JULIA P. HEIT, New York, N.Y. (Diller, Schmuckler & Asness, New York, N.Y., of Counsel), *for Defendant-Appellant Anthony Stassi.*

RALPH S. NADEN, New York, N. Y., *for Defendant-Appellant Sorenson.*

JAMES E. NESLAND, Assistant U. S. Attorney (Robert B. Fiske, Jr., U. S. Attorney for the Southern District of New York; Howard S Sussman, Lawrence B. Pedowitz, Assistant U. S. Attorneys, of Counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

After a six-week jury trial before Judge Whitman Knapp in the United States District Court for the Southern District of New York, appellants were convicted of conspiracy to import and distribute heroin between January 1, 1970 and December 30, 1972; of importing and selling 40 kilograms in September 1970, and of importing and distributing 70 kilograms in June 1971.

The tale of their misdeeds is like the all too familiar plot of a Class B movie rerun, *see United States* v. *Cirillo,* 468 F.2d 1233 (2d Cir. 1972), *cert. denied,* 410 U.S. 989 (1973); *United States* v. *Santana,* 503 F.2d 710 (2d Cir. 1974), *cert. denied,* 419 U.S. 1053 (1974); *United States* v. *Magnano,* slip op. 5471 (2d Cir. Sept. 7, 1976), and does not merit a detailed recounting. Hatched in the federal penitentiary in Atlanta, Georgia where appellants Joseph Stassi and William Sorenson were incarcerated, the conspiracy contemplated the purchase of heroin from a "French connection" and the smuggling of it into the United States. Anthony Stassi, Joseph's brother, was recruited as the outside man to arrange the purchase and distribution of the drugs, and Sorenson, upon his release from prison in March 1970, assisted him. The proof, evaluated in the light most favorable to the government, was

sufficient to support the convictions. Of appellants' numerous assertions of procedural error, only a few invite discussion.

Deportation of Otvos

Indictment 75 Cr. 395, under which appellants were tried and convicted, named Jean Claude Otvos, another inmate at Atlanta, as a fellow conspirator. Subsequent to the issuance of the indictment on April 17, 1975, it was discovered that Otvos had been paroled and deported on March 3, 1975. Appellants, relying upon *Washington* v. *Texas*, 388 U.S. 14 (1967), contend that, in deporting Otvos, the government violated their Sixth Amendment right to examine a potentially important witness. We find no merit in this argument.

There was, as Judge Knapp found, a substantial probability that Otvos, as indicted co-conspirator, would have claimed his Fifth Amendment privilege and refused to testify had he been present in court. *See United States* v. *Finkelstein*, 526 F.2d 517, 524 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976). We need not, however, rest our decision on that ground.

At the hearing conducted by Judge Knapp on appellants' motion to dismiss the indictment, three special agents of the Federal Drug Enforcement Administration testified that Otvos told them in December 1974 that he would be eligible for parole in May 1975. This information was confirmed by an Intelligence Analyst of the Eastern District Strike Force, who was investigating Otvos on behalf of the Parole Board.

The Parole Board had requested this investigation in December 1974 but was not advised of Otvos' possible involvement in the instant conspiracy until January 31, 1975. In the meantime, because of a change in the law, Otvos became eligible for an earlier parole; and it was decided

that he would be paroled and deported on March 3. Judge Knapp found that the Parole Board was grossly negligent in proceeding with the parole and deportation of Otvos after receiving notice of the possibility of his indictment but refused to charge the United States Attorney's office or the Drug Enforcement agents with the same lack of care. Insofar as this finding was one of fact, it had ample support in the evidence. Appellants' contention that the Parole Board's negligence must be imputed to the prosecution was properly rejected by the District Judge. *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971); *cf. United States* v. *Morell*, 524 F.2d 550, 555 (2d Cir. 1975).

Appellant Anthony Stassi also relies upon the absence of Otvos to support his contention that he was deprived of his constitutional right to a speedy trial. Stassi was originally indicted on April 30, 1973 under Indictment 73 Cr. 405, which charged him alone with the receipt of 40 kilograms of heroin on September 28, 1970. This indictment was sealed in order that the government could pursue the investigation which led to the uncovering of the massive conspiracy established on the trial below.

We fail to see how the government's delay in bringing Stassi to trial on the 1973 indictment charging him with a single substantive narcotics violation would require dismissal of the 1975 indictment charging him with long-term participation in an extended conspiracy. This is not similar to the situation which existed in *United States* v. *Alo*, 439 F.2d 751, 754-55 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971) where the second indictment merely supplanted a substantially identical sealed indictment returned several years before. Moreover, because there is no indication that Otvos would have been a potential witness had Stassi been prosecuted under the earlier indictment, appellant has

failed to demonstrate the prejudice required for dismissal. *United States* v. *Alo, supra,* 439 F.2d at 755.

The government was entitled to carry on its criminal investigation despite the return of the 1973 indictment. *United States* v. *Poeta,* 455 F.2d 117, 122 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972). Appellant's further argument that he was thereby subjected to the "humiliation and degradation" of government surveillance furnishes too shaky a foundation upon which to build a claim of prejudice. *Cf. Hoffa* v. *United States,* 385 U.S. 293, 309-10 (1966).

Evidence Outside the Scope of the Indictment

Although the indictment charged a conspiracy running from 1970 to 1972, the District Judge permitted evidence of narcotics related transactions occurring in 1973. Numerous decisions of this Court have held such testimony to be admissible where it is probative of the existence of the conspiracy charged or the participation of the alleged conspirator. *See, e.g., United States* v. *Nathan,* 476 F.2d 456, 460 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973); *United States* v. *Miranda,* 526 F.2d 1319, 1331 (2d Cir. 1975), *petition for certiorari filed,* 44 U.S.L.W. 3692 (May 1, 1976). Judge Knapp emphasized time and again that he was admitting the disputed testimony for the limited purpose of establishing the association of the parties. *See United States* v. *Diggs,* 497 F.2d 391, 394 (2d Cir. 1974), *cert. denied,* 419 U.S. 861 (1975). He also instructed the jury that the defendants were being tried only for the conspiracy charged in the indictment and that, if the jurors had a reasonable doubt as to the defendants' guilt, they were to acquit, even though they were "dead certain" that defendants had committed some other crime. There was no error here.

Proof was also introduced of numerous unrelated criminal acts by accomplices called as government witnesses, much of it on direct examination by the prosecution. Because the defense was armed with information required by 18 U.S.C. § 3500 and *Brady* v. *Maryland*, 373 U.S. 83 (1963) with which to discredit these witnesses, the government was entitled to take the initiative in this regard so that it would not be accused of withholding information from the jury. *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972). Defendants' failure to object indicates that the prosecution's questioning was neither unexpected nor improper.

Special Findings by the Jury

Prior to May 1, 1971, the conspiracy with which appellants were charged constituted a violation of 21 U.S.C. §§ 173 and 174. As of May 1, 1971, the provisions of these sections were replaced by §§ 812, 841, 846, 952 and 963. Because the old sections and the new provided for different terms of punishment, the District Judge, for sentencing purposes, was required to know which sections had been violated. *See Bradley* v. *United States*, 410 U.S. 605 (1973). With this in mind, he asked the jury to indicate in writing whether, in the event they found defendants guilty of the conspiracies charged, they became members of the conspiracy before or after May 1, 1971. Appellants argue that this was a request for a special verdict, generally held to be improper in a criminal case. *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971). However, where the specific information sought is relevant to the sentence to be imposed, it is not error to request it of the jury. 2 Wright, Federal Practice and Procedure: Criminal § 512 (1969); *Jalbert* v. *United States*, 375 F.2d 125, 126 (5th

Cir.), *cert. denied*, 389 U.S. 899 (1967); *United States* v. *Ogull*, 149 F.Supp. 272 (S.D.N.Y. 1957). In any event, appellants failed to object to the practice adopted by the District Court and may not now be heard to complain. *Cf. United States* v. *Jones*, 425 F.2d 1048, 1057 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970).

Brady Material

On February 28, 1974, in a completely unrelated investigation, Special Agents James Bradley and Carlo Boccia, both of whom were witnesses below, attempted to stop the automobile of a person whom they mistakenly believed to be a narcotics dealer. An altercation ensued, during which Bradley shot and wounded the driver. The incident was investigated by both a federal and a state grand jury, and no charges were filed against any of the individuals involved. Moreover, a charge of assault by Bradley against the driver was eventually dismissed. Appellant Sorenson contends that a new trial should be granted under *Brady* v. *Maryland*, *supra*, because the government did not disclose this information to the defense.

While the concept of the *Brady* rule is clear, a review of our decisions in cases such as *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3756 (June 30, 1976); and *United States* v. *Morell*, *supra*, 524 F.2d at 550 shows that the explication of the rule is sometimes as difficult as its application. Where the undisclosed evidence relates to the credibility of a government witness (*see Giglio* v. *United States*, 405 U.S. 150, 154 (1972), these difficulties are magnified by the broad scope of defendants' inquiry. In exploring the credibility of a government witness, de-

fense counsel may within reasonable limits inquire as to his "interest, his motives, his prejudices or hostilities, his means for obtaining knowledge of the fact, his power of memory, his way of life, his associations" and other similar matters. *United States* v. *Lawinski*, 195 F.2d 1, 7 (7th Cir. 1952); *see United States* v. *Dillon*, 436 F.2d 1093, 1095 (5th Cir. 1971); *Arpan* v. *United States*, 260 F.2d 649, 658 (8th Cir. 1958). Because evidence as to any or all of these matters might arguably be pertinent, something more than pertinancy had to be shown to mandate the granting of a new trial. There must have been a "significant chance" that the evidence would have affected the judgment of the jury. *United States* v. *Fried*, 486 F.2d 201, 203 (2d Cir. 1973), *cert. denied*, 416 U.S. 983 (1974). The District Judge felt that the undisclosed evidence above described did not meet this requirement, and we agree.

Moreover, subsequent to Judge Knapp's decision below, the Supreme Court fashioned a more exacting standard for the granting of a new trial in cases such as this. The thrust of *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5017-18 (U.S. June 24, 1976) is that, in the context of the entire record, the omitted evidence must raise a reasonable doubt as to the defendant's guilt. Because the undisclosed evidence here was insufficient under the test previously applied in this circuit, it certainly does not satisfy the requirements of *Agurs*.

Other Assertions of Error

Appellants' remaining assertions of error require no extended discussion. Judge Knapp correctly charged the rule of *Pinkerton* v. *United States*, 328 U.S. 640 (1945) which permitted the jury to convict each of the conspirators of the substantive offenses charged if they were committed in furtherance of the conspiracy and were reasonably fore-

seeable by the defendant whose guilt was being considered. *United States* v. *Finkelstein, supra,* 526 F.2d at 522. Appellant Sorenson cites no authorities to support his post-trial argument that he was "extremely prejudiced" because two men in civilian clothes, who Sorenson asserts were police officers, accompanied another police officer when he was called as a government witness. The District Judge's comment that "[t]wo people walked in and walked out" appropriately summarizes this incident.

After a full hearing, Judge Knapp found that a government witness' selection of Sorenson's photograph was "in no way the result of suggestion". Bearing in mind the independent sources of identification described by the witness, *United States* v. *Mims,* 481 F.2d 636, 637 (2d Cir. 1973), and the substantial corroborative evidence of Sorenson's participation in the conspiracy, *United States* v. *Reid,* 517 F.2d 953, 967 (2d Cir. 1975), we do not find this to be the "rare exception" in which the District Judge's determination should be overruled. *United States* v. *Mims, supra,* 481 F.2d at 637.

With excerpts carefully culled out of context, appellants urge that they were deprived of a fair trial by remarks of the court and the prosecution. Having examined each challenged incident in the setting of the whole trial, *United States* v. *Wexler,* 79 F.2d 526, 530 (2d Cir. 1935), *cert. denied,* 297 U.S. 703 (1936), we find no merit whatever in appellants' contentions. Insofar as the forceful character of the prosecutor's summation may have exceeded the norm, this was prompted by defendants' repeated assertions that the prosecution was participating in or knowingly abetting a frame-up. *United States* v. *Santana, supra,* 485 F.2d at 371.

In summary, we find that appellants received a fair trial and that there was ample proof of their guilt. The judgments of conviction are therefore affirmed.